

26-28 & nn 27-31 In this context, this bedrock principle means that states lack authority to regulate BellSouth's jurisdictionally interstate and federally tariffed DSL transmission service, as well as its jurisdictionally interstate retail FastAccess Internet access service, as to which BellSouth's federally tariffed DSL transmission is a necessary input

The states would lack that authority even if this Commission had not already resolved this substantive issue The proper course in that circumstance would have been for CLECs allegedly aggrieved by BellSouth's policy to file a complaint at this Commission under section 208, not to seek to circumvent this Commission's authority by having state commissions resolve the matter, each according to its own view of wise policy.

In other words, to the extent there is any open controversy here, it is a controversy that this Commission has the authority to decide by creating a single national policy for interstate broadband services It is not one that the states may decide by imposing a variety of disparate and conflicting rules on interstate services

Indeed, the state commission commenters largely do not dispute that they lack authority over jurisdictionally interstate communications. The Louisiana PSC, for instance, repeatedly proclaims that "it lacks jurisdiction to regulate purely interstate telecommunications services and information services " Louisiana PSC at 3. It asserts, however, that its decisions "have nothing to do with regulating terms [or] conditions of DSL service," and, thus, allegedly do not impinge on this Commission's interstate authority *Id* at 17 The Florida PSC has similarly asserted that its "decision[s] should not be construed as an attempt by this Commission to exercise jurisdiction over the regulation of DSL service " Final Order on Arbitration, *Petition by Florida Digital*

Network, Inc. for Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, at 11 (Fla. PSC June 5, 2002) (“*FDN Final Order*”) (BellSouth Request Attach. 3), *see also* Alabama PSC at 3, Georgia PSC at 4-5.

These assertions cannot be squared with the reality of what the states have done. Under any rational understanding, state commission orders that determine to whom BellSouth must offer its interstate broadband services, and under what conditions, plainly regulate those services. As the Fifth Circuit has explained in a case involving this Commission, “dictat[ing] the circumstances under which . . . service must be maintained” necessarily constitutes regulation of that service. *Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 421-22 (5th Cir. 1999). If a state commission purported to tell America Online to whom it must offer its broadband Internet access service, there would be no doubt that the commission was “regulating” AOL’s broadband service. The same rule applies here.

Indeed, once a state commission determines that BellSouth must provide a service, that commission will of necessity become involved in dictating the terms and conditions of service. Otherwise, there would be no way to determine whether BellSouth is in reality offering the service in the circumstances that the state commission has required. For instance, if BellSouth offered stand-alone broadband to CLEC voice customers only for \$2,000 per month or only after a 60-day installation delay, state commissions would necessarily have to consider whether that constituted compliance with their requirements. *See, e.g., Trinko*, 124 S. Ct. at 879 (creation of a duty to deal necessarily requires regulators (there, a court) “to act as central planners, identifying the proper price, quantity, and other terms of dealing”). It should thus be no surprise that

state commissions have already purported to require that BellSouth must provide for “seamless” transitions of service Louisiana PSC at 8 (reprinting Louisiana PSC order clarification) Similarly, the Louisiana PSC states forthrightly in its comments in this proceeding that its rulings require that BellSouth’s rates for broadband service not be “anti-competitive ” Louisiana PSC at 12

Acknowledging that these state commissions are in fact regulating BellSouth’s broadband services, CLEC commenters nevertheless argue that this is a permissible exercise of state authority None of their arguments holds water.

First, it is wrong to say, as some commenters do, that state commissions have jurisdiction here because Internet communications are “jurisdictionally mixed ” MCI at 14-16, *see also, e g* , FDN at 16-18, AT&T/CompTel-ASCENT at 16-18. These parties argue that, under cases such as *Louisiana Public Service Commission v FCC*, 476 U.S. 355 (1986), and *NARUC v FCC*, 880 F.2d 422 (D.C. Cir. 1989), states may regulate jurisdictionally mixed services unless that regulation negates this Commission’s exercise of its powers *See, e g* , AT&T/CompTel-ASCENT at 16-17

Those cases have no relevance to the present circumstance. The Commission has already squarely held that DSL service for Internet access should be treated as jurisdictionally interstate and subject to federal tariffing and exclusive regulation by this Commission More specifically, under the Commission’s “mixed-use” rule for special access services, a service that carries 10% or more of interstate traffic is treated as *wholly interstate* for jurisdictional purposes *See, e g* , *Decision and Order, MTS and WATS Market Structure*, 4 FCC Red 5660, 5660, ¶ 2 (1989) (applying this rule for the first time and determining that special access lines that carried both interstate and intrastate traffic

were properly classified as interstate for jurisdictional purposes). As the Commission has explained, this 10% rule is specifically designed to establish clear and exclusive federal authority over such services by avoiding “the disadvantages in terms of administrative complexity, customer confusion, and economic inefficiency inherent in” allowing divided authority over such facilities. *Id.* at 5660, ¶ 6

Applying the 10% rule to the use of DSL service for Internet access – the precise service at issue here -- the Commission concluded in the *GTE Tariff Order* that such a service is an interstate “special access service, thus warranting *federal* regulation.” 13 FCC Rcd at 22480, ¶ 25 (emphasis added). The Commission made a specific jurisdictional determination that all DSL traffic for Internet access should be treated as interstate and therefore subject to regulation exclusively at the federal level

For that reason, once the Commission decided that DSL service used for Internet access was to be treated as jurisdictionally interstate, it *expressly concluded that it was unnecessary to consider arguments whether state regulation was “pre-empted” under the series of cases cited by CLEC commenters*. After citing *Louisiana PSC* and *NARUC* and discussing how those cases indicate that “pre-emption” is warranted under those cases where state regulation “negates” the exercise of this Commission’s jurisdiction, the Commission determined that it need not evaluate that issue in light of its holding that the “mixed use” facilities doctrine applies. “In light of our finding that GTE’s ADSL service is subject to federal jurisdiction under the Commission’s mixed use facilities rule and properly tariffed as an interstate service, *we need not reach the question of whether the inseverability doctrine applies*.” *Id.* at 22481, ¶ 28 (emphasis added). The Commission,

moreover, declined CLEC requests to defer tariffing of these issues to the states. *See id.* at 22482, ¶ 30.¹⁹

In sum, the Commission itself has already made plain that the services at issue here are treated as jurisdictionally interstate under the mixed-use facilities rule and, thus, that *it did not matter* whether pre-emption would *also* be justified under *Louisiana PSC*, *NARUC*, and similar cases. The CLECs' argument crashes head-on into this binding Commission precedent.

For the same reasons, the recent decisions in *Qwest Corp. v. Scott*²⁰ and *Illinois Bell Telephone Co. v. Globalcom, Inc.*²¹ are directly relevant to this context. Those cases demonstrate that state commissions lack any authority to regulate jurisdictionally interstate special-access services. In *Qwest*, for example, the court determined that the Minnesota commission could not legally regulate an incumbent carrier's provision of interstate special access services (the same legal category into which DSL service falls) because this Commission had "determined that mixed-use special access is to be classified as interstate." 2003 WL 79054, at *10; *see also Illinois Bell*, 2003 WL 21031964, at *2. The *Qwest* court did not need to go beyond the Commission's finding that the services were jurisdictionally interstate to reach that correct conclusion.

By contrast, cases such as *Southwestern Bell Telephone Co. v. Public Utility Commission*, 208 F.3d 475 (5th Cir. 1999), and this Commission's *ISP Declaratory*

¹⁹ These facts distinguish this case from ones such as *Diamond International Corp. v. FCC*, 627 F.2d 489 (D.C. Cir. 1980), which FDN cites in its comments. Far from "refrain[ing] from exercising jurisdiction," as in that case, FDN at 18, here the Commission has exercised its authority by requiring federal tariffing and has expressly declined to yield its authority to the states.

²⁰ No. 02-3563, 2003 WL 79054 (D. Minn. Jan. 8, 2003).

²¹ No. 03-C-0127, 2003 WL 21031964 (N.D. Ill. May 6, 2003).

Ruling,²² are not on point here. Compare AT&T/CompTel-ASCENT at 18. Those cases involved dial-up traffic, which the Commission expressly refused to address in the *GTE Tariff Order*, see 13 FCC Rcd at 22481-82, ¶ 29, and, moreover, implicated a compensation issue that the D.C. Circuit ultimately concluded was not controlled by the jurisdictional nature of the traffic. See *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).²³

Second, it is equally incorrect that this Commission's *GTE Tariff Order* and, more generally, the Commission's control over interstate services is limited to the *rates* that are charged for those services. See, e.g., *Z-Tel* at 25-27; *LPSC* at 17. The Supreme Court squarely held in *AT&T Corp. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), that state law may not alter the terms or conditions of a tariffed service just as much as it may not alter the rates charged under the tariff. See *id.* at 223-24 (emphasizing that section 203(a) requires filed tariffs to show not only rates, but also "the classifications, practices, and regulations affecting such charges") (internal quotation marks omitted), see also *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 195 (2d Cir. 2001) (binding terms of a tariff "include both monetary and non-monetary terms . . . , including the quality and the type of services"). That is why, as BellSouth demonstrated in its Request (at 28-29),

²² Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689 (1999), vacated, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

²³ In any event, the Commission has now made plain that dial-up ISP-bound traffic is indeed jurisdictionally interstate. See *Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175, ¶ 52 (2001) ("[Internet-bound] traffic is properly classified as interstate" and falls within the Commission's "jurisdiction"), remanded, *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), cert. denied, 123 S. Ct. 1927 (2003).

the New York and Massachusetts commissions properly concluded that they lacked authority to modify the terms and conditions of federally tariffed services by creating performance standards for such interstate services²⁴

Third, it is not the case that states may impose requirements on interstate and federally tariffed services so long as there is no explicit conflict between those requirements and the federal tariff. *See, e.g.*, MCI at 24-25 (asserting that there is no “conflict” here), FDN at 19-20 (“[N]othing in the tariff is obviously incompatible with the [Florida] PSC Order ”); AT&T/CompTel-ASCENT at 34 (“BellSouth can . . . establish no conflict”).

The relevant rule is that this Commission has exclusive jurisdiction over interstate services and that state law cannot modify or add to the terms of a federal tariff. *See, e.g.*, *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (filed tariff “conclusively and exclusively enumerate[s] the rights and liabilities as between the carrier and the customer”) (internal quotation marks omitted). Judge Posner thus has correctly stated that, with respect to federal tariffs, “[f]ederal law does not merely create a right, it occupies the whole field, displacing state law.” *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998). Accordingly, AT&T itself has told the Supreme Court that, even

²⁴ Section 252 likewise does not grant state commissions the authority to alter the terms under which interstate services are offered. *See, e.g.*, Z-Tel at 28-31. No party identifies any provision of section 251(b) or (c), or of this Commission’s rules, that state commissions are implementing by imposing the obligations at issue here on BellSouth’s interstate service. Compare Z-Tel at 30 (discussing *Southwestern Bell*, where the state commission was applying section 251(b)(5)’s reciprocal compensation requirement). Nor could they, given the Commission’s findings in the *Triennial Review Order* and its prior repeated determinations that BellSouth’s policy is nondiscriminatory under section 251(c)(3). And section 252(e)(3)’s preservation of state-law authority over *intrastate* matters has no relevance given this Commission’s exclusive authority over interstate services such as this one.

if a federal tariff were in fact silent on an issue, creating a “gap,” that gap must be “‘filled in’ *uniformly as a matter of federal law*,” not through “state” law²⁵

Indeed, there would be little point in having a federal tariff if the service offered under that tariff differed from state to state. *See Ivy Broad Co. v AT&T Co.*, 391 F.2d 386, 491 (2d Cir. 1968) (“The published tariffed rate will not be uniform if the service for which a given rate is charged varies from state to state according to differing state requirements.”) Nor would the Commission have “exclusive” jurisdiction over interstate services, as it has repeatedly proclaimed it does, if states were free to add any requirements they desired as to those services as long as they did not directly conflict with a specific federal requirement.²⁶

Fourth, even if a conflict were necessary, it exists here. BellSouth’s tariff authorizes it to provide DSL transmission only over lines that it “provide[s].” BellSouth Request at 30. When a CLEC leases a loop, it is the CLEC, *not* BellSouth, that controls that facility, and has the exclusive right to use it. *See* 47 C.F.R. § 51.309. It is no more reasonable to say that BellSouth is “providing” a facility that it has leased to another party, and over which that other party exercises exclusive rights, than to suggest that the landlord, and not the tenant, is “providing” the location for an event held at a leased apartment.

²⁵ AT&T Brief, 1998 WL 25498, at *33 (emphasis added)

²⁶ The case cited by AT&T/CompTel-ASCENT, *Access Telecom, Inc. v MCI Telecommunications Corp.*, 197 F.3d 694 (5th Cir. 1999), is not to the contrary. That case involved an issue outside of the contractual relationship created by the tariff between the carrier and its customer. As the court said, the “right to halt one contract does not grant the right to interfere with another.” *Id.* at 711. This case, of course, is very different. It involves BellSouth’s right to “halt” its tariff obligation to offer DSL services to its customer when BellSouth no longer controls the UNE loop over which that service is offered.

In any event, it is the duty of this Commission, not a state body, to interpret a federal tariff so that the tariff has the same meaning in every state, and does not vary between Florida and, say, South Carolina. *See, e.g., Illinois Bell*, 2003 WL 21031964, at *3 (a state commission lacks “jurisdiction to interpret a tariff exclusively within the federal domain”) If every state could interpret a federal tariff, there could be as many as 50 different readings of the same federal instrument, which would make the filing of federal tariffs senseless. To quote AT&T again, Supreme Court case law requires that this Commission interpret such tariffs “to assure that those [interpretative] questions are resolved uniformly and in accord with the Act’s substantive requirements.”²⁷

Fifth, and finally, there is no basis to suggest that this Commission’s jurisdiction is exclusive only as to BellSouth’s DSL transmission service and not as to its FastAccess Internet access service, as to which that transmission service is a necessary component. *See AT&T/CompTel-ASCENT* at 32-33. If the tariffed DSL transmission service is interstate, as the Commission has said it is, then the Internet access service that is based on that service must also be interstate and subject to the Commission’s exclusive jurisdiction. Moreover, because the Commission’s regulations require BellSouth to apply to itself the same terms and conditions contained in the transmission tariff, *see* 47 C.F.R. § 64.901(b)(1), regulation of BellSouth’s retail service necessarily adds to the terms of the underlying tariffed transmission, again in violation of the tariff. AT&T relies upon nothing other than bald assertions in contending otherwise.

²⁷ AT&T Brief, 1998 WL 25498, at *34

IV. THE STATES LACK AUTHORITY TO REGULATE INTERSTATE INFORMATION SERVICES SUCH AS FASTACCESS

Although the other legal points discussed above provide a wholly sufficient basis on which to resolve this case, state commission regulation of FastAccess is also preempted by the Commission's decision specifying that information services must remain unregulated. As the Commission long ago explained, "the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network." Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 387, ¶ 7 (1980). The preemptive scope of this Commission determination is strongly fortified by the 1996 Act, which establishes Congress's intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2) (emphasis added).

Although some commenters challenge the scope of federal preemption here, even they acknowledge that "it is clear that the Commission has preempted some forms of state regulation." FDN at 13. At the very least, these commenters acknowledge, a state may not impose any public-utility or common-carrier regulation even on jurisdictionally mixed information services. *See id.* at 13-14, AT&T/CompTel-ASCENT at 30-31.²⁸

Even if this were the proper test (it is not because, among other things, DSL-based services are treated as jurisdictionally interstate, precluding *all* state regulation, as

²⁸ Because DSL-based services are treated as jurisdictionally interstate, states in fact have no authority of any kind here. The Commission thus need not reach this issue. As demonstrated in the text, however, even under the CLEC test, states would still be preempted.

discussed above and because any state regulation of interstate services would necessarily negate the federal policy of deregulation), the state commission decisions would still flunk it. No party has any cogent explanation as to how it cannot be utility regulation to tell BellSouth to whom it must offer service, on what terms and conditions, and on what rates. Indeed, as BellSouth discussed above, *see supra* pp. 24-25, once a regulator determines that a service must be offered, it inevitably must evaluate terms and conditions as well as rates. Otherwise, the regulator's ruling could be rendered meaningless.

Accordingly, the state commissions' determination to exercise authority here cannot be minimized. In fact, it necessarily involves precisely the kind of regulation of rates, terms, and conditions that constitutes core public-utility regulation. *Cf.* 47 U.S.C. §§ 201, 202 (requiring that rates and terms be reasonable and nondiscriminatory).

For that reason, in the *Vonage* case, the court determined that, in light of this Commission's long-established deregulatory policy and Congress's decision that the Internet should remain "unfettered" by state or federal regulation, 47 U.S.C. § 230(b)(2), state regulation of information services is necessarily prohibited. *See Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, No. 03-5287, 2003 U.S. Dist. LEXIS 18451 (D. Minn. Oct. 16, 2003). Contrary to commenters' claims, the court did not parse the state commission's ruling to determine whether it passed some threshold of onerousness. Instead, the court held without limitation that "*state regulation over [information] services is not permissible*." *Id.* at *27 (emphasis added). *Vonage* establishes that all such regulation of information services *necessarily* conflicts with this Commission's policy – which is one of deregulation and reliance on market forces – and thus is

unlawful. *See id.* at *27-*29 (any such regulation would be an “obstacle to the ‘accomplishment and execution of the full objectives of Congress’”)

Indeed, the state commission decisions that BellSouth has discussed do not claim otherwise. On the contrary, the state commissions acknowledge that they cannot regulate information services, but bizarrely contend that they are not regulating those services. *See, e.g., FDN Final Order* at 8 & n 3 (“agree[ing]” that the states cannot regulate FastAccess). For the reasons that BellSouth has already discussed, that proposition is unsustainable.

Finally, *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), does not undermine this analysis by calling into question whether DSL-based Internet access is an information service. As we have explained, that case, in which petitions for rehearing are now pending, holds that cable modem service is both a telecommunications service and an information service. *See* BellSouth Request at 23. The court believed that the transmission component constituted a “telecommunications service” and that the combined transmission and data manipulation was an “information service.” *See* 345 F.3d at 1128-29. BellSouth argues only that the latter service (in this context, FastAccess) is covered by this Commission’s preemption of regulation of information services.

V. BELLSOUTH’S ARGUMENTS ACCORD WITH THIS COMMISSION’S NATIONAL BROADBAND POLICY BY ENCOURAGING INVESTMENT AND INNOVATION IN BROADBAND FACILITIES

This Commission need not revisit policy issues to resolve this matter. It is nevertheless the case that, as the Commission has previously found, granting the relief

that BellSouth has sought would further the central policies of this Commission, and those of the 1996 Act

As noted, with the passage of the 1996 Act, Congress's express determination was "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation " 47 U S C § 230(b)(2) Congress sought to remove unnecessary obstacles to investment in new and innovative broadband services by "reduc[ing] regulation in order to . . . encourage the rapid deployment of new telecommunications technologies."²⁹ Congress further instructed this Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans," using "regulating methods that remove barriers to infrastructure investment."³⁰

In accord with this congressional intent, the Commission's decisions to date have sought to ensure that both ILECs and CLECs have the incentives necessary to develop and offer their own innovative broadband offerings As the Commission has stated, its "primary regulatory challenge for broadband is to determine how [it] can help drive the enormous infrastructure investment required to turn the broadband promise into a reality " *Triennial Review Order*, 18 FCC Rcd at 17110, ¶ 212. But this Commission's national policy to encourage such broadband investment and deployment will never take root if state commissions are effectively permitted to "opt-out" of the deregulatory national framework in favor of doing their own thing

It is notable in this regard that none of the CLEC commenters has offered anything in the way of substantive support for the notion that these state decisions

²⁹ Telecommunications Act of 1996, Pub L No 104-104, pmb., 110 Stat. 56.

³⁰ 47 U S C § 157 note

promote broadband deployment. No commenter could reasonably claim that, if these state decisions are not preempted, competitive carriers are *more likely* to invest in and offer their own competitive broadband services.

At the same time, these regulatory obligations also significantly diminish BellSouth's own investment incentives. Starting in 1998, BellSouth undertook the business risk of investing in an unproven technology to provide broadband Internet access services over its legacy copper-loop facilities. This technology was, and is, known as Asymmetrical Digital Subscriber Line, or "ADSL."

Digital Subscriber Line Access Multiplexers ("DSLAMs") are the critical equipment necessary to provide DSL-based, broadband Internet access. DSLAMs have been readily available to any potential purchaser since the mid-1990s. BellSouth launched its first market trial for ADSL services in 1997. When BellSouth began investing in a DSL-based product offering, BellSouth was in precisely the same position as every other company seeking to enter the broadband marketplace.

Given the fact that cable companies were already offering a competitive broadband Internet access service, BellSouth had to determine the most cost-effective way to provision a competitive broadband service in a manner that could efficiently compete with cable modem service in terms of both price and service quality. In order to compete with cable modem service that was utilizing existing cable television infrastructure, BellSouth determined that the most efficient manner in which to provision the service was to provide ADSL-based broadband service over those facilities that BellSouth was already utilizing to provide voice service. BellSouth's policy, as set forth in its federal tariff, is thus to provide DSL service on any BellSouth-provided exchange

line facility BellSouth's policy is consistent with the manner in which BellSouth's DSL offerings were designed and tariffed, which is as an overlay service to an existing exchange line ³¹

As a result of BellSouth's considerable investments, more than 70% of households in BellSouth's nine-state region are currently capable of receiving BellSouth's DSL services. The remaining 30% of such households are located in rural areas where DSL services are much more expensive to deploy or are urban/suburban households served by loops that, for technical reasons, are not currently able to support DSL services. Substantial incremental investment will be necessary to close this gap just so the remaining consumers will have an opportunity to receive the most basic, first-generation DSL-based broadband service offering.

In short, BellSouth saw a business opportunity and capitalized on it by making wise, prudent capital investments to offer DSL service as a competitive alternative in the broadband marketplace. BellSouth has made a tremendous investment to support its DSL offerings, including the cost of upgrading BellSouth's backhaul network and deploying DSL capability in hundreds of BellSouth central offices and thousands of BellSouth remote terminals.

BellSouth must continue to invest, moreover, to deploy the infrastructure necessary to support the next-generation of broadband technologies. At issue here is whether this Commission will provide the regulatory certainty necessary to create *incentives for additional DSL investment as well as the enormous future investments that*

³¹ Any CLEC that wants to resell BellSouth's voice service to a customer can provide that service on the same line used by BellSouth to provide FastAccess. Thus, consumers that want BellSouth FastAccess service can also purchase voice service from any CLEC willing to resell it.

will be necessary to continue building the next-generation FTTC/FTTP-type architectures necessary to meet consumer demand. At best, DSL technology is an interim (first) step in building tomorrow's end-to-end digital network that will be necessary for BellSouth to keep pace with its competition. See *Wireline Broadband NPRM*, 17 FCC Rcd at 3026, ¶ 12 (“The logical technological evolution of the network is the complete or near-complete replacement of copper lines with end-to-end fiber optic transmission facilities.”)

BellSouth's broadband investments allow BellSouth to offer a package of products and services in order to meet a customer's total telecommunications needs. The ability to offer such a package is essential for BellSouth to compete successfully against those companies, such as cable providers, that also offer a full suite of communications products and services, including local services, long distance, and Internet access. This Commission's prior determinations regarding BellSouth's provisioning of its DSL services have recognized these realities of the marketplace and, instead of requiring BellSouth to change its policies, have sought to encourage other providers to develop similar bundled offerings. See *Triennial Review Order*, 18 FCC Rcd at 17135, ¶ 261, 17141, ¶ 270. Those decisions create the proper incentives for both BellSouth and its competitors to invest in broadband, to offer “a bundled voice and xDSL service,” and to engage in “innovative arrangements” that are consistent with the statutory goal “of encouraging competition and innovation in all telecommunications markets.” *Id.* at 17135, ¶ 261.

Some competing providers have invested in broadband platforms and thus can offer a similar suite of services as BellSouth. Others have not. That is those companies'

choice, but the fact that BellSouth has invested in order to provide a set of services that some consumers want, while other carriers have not done so, does not make any resulting BellSouth advantage illegitimate. “So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity: more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.” *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979).

Indeed, the whole reason for this proceeding is that some CLECs have decided that it is far cheaper to petition state commissions to rewrite the rates, terms, and conditions of BellSouth’s DSL services, rather than to invest in a competitive offering, to remove any competitive disadvantage that they are suffering. But state regulation of BellSouth’s broadband services eliminates a carrier’s incentive to provide a competitive offering and thus undermines this Commission’s policies. Indeed, such regulation creates market distortions in which a company would rather have its broadband facilities go unutilized if not otherwise necessary to compete. For instance, during the state commission proceedings at issue in this docket, BellSouth learned that, even though MCI has DSL facilities installed in 809 central offices and offers DSL services to select classes of business customers in 31 different metropolitan markets across the United States, *MCI refuses to utilize its own broadband facilities to offer DSL services to its own residential Neighborhood customers*. See MCI’s Responses to BellSouth’s First Interrogatories, Docket No. 11901-U, Resp. 20(111), at 18 (Ga. PSC Sept. 23, 2002) (“MCI Responses”).

(attached as Exh 2). Rather than provide its own DSL services to its own customers, MCI has demanded that state commissions order BellSouth to provide broadband services to MCI's Neighborhood customers.

Moreover, during the last round of TELRIC cost proceedings within BellSouth's nine-state region, MCI demanded that state commissions order BellSouth to provide stand-alone line splitters in order to enable line splitting

[T]he CLECs' ability to compete in mass markets will be severely constrained if they are unable to also provision data services in a timely and cost effective manner. Line splitting will allow a voice CLEC using UNE-P to offer a full suite of features and services to its customers without having to collocate

Rebuttal Testimony of Greg Darnell, Docket No. U-24714-A, at 13 (La. PSC Feb. 26, 2001). Similarly, in Georgia, MCI stated.

Georgia's residential customers deserve a choice of providers for both voice services and advanced data services. Line splitting allows voice service to be provided by a voice CLEC and data service is provided on the same line by another company – either another CLEC, an ILEC data affiliate, or the ILEC itself

Post Hearing Brief of MCI, Docket No. 11900-U, at 3 (Ga. PSC filed Mar. 1, 2001).

UNE-P is the vehicle for [MCI's] mass markets local entry in those five states where it has entered thus far, and will be used in those additional states where entry is planned, including Georgia. Without UNE-P line-splitting, a residential consumer who wants voice and data services on the same line must be a retail voice customer of BellSouth.

Id. at 4

Ultimately, state commissions granted MCI's request for stand-alone line splitters, and BellSouth complied. Unfortunately, MCI subsequently stopped further deployment of its DSL services "because of the high deployment costs." MCI Responses, Resp. 20(III), at 18. Instead of pursuing that deployment, MCI decided that it

would be cheaper to insist that state commissions regulate away any competitive disadvantage that would otherwise have caused it to continue investing in its own broadband service offerings

At least as significant, while MCI and other carriers decry BellSouth's policy, they market broadband services with requirements no different from those imposed by BellSouth, *i.e.*, they provide broadband Internet access service only to their voice customers.³² Once again, MCI represents the most glaring example. As MCI's own document states, it provides DSL services only to its local voice customers: "*If you change your local telephone company, your DSL Service will be cancelled, and you will be assessed the equipment charge of \$150.00*" BellSouth Telecommunications, Inc.'s Motion to Reopen the Record, Docket No. 11901-U, App. 2, at 8-9 (Ga. PSC filed June 23, 2003) (emphasis added) (attached as Exh. 3), *see also id.* App. 1, at 8. Lest there be any misunderstanding: "*Your local phone company must be MCI for you to receive DSL Service*" *Id.* App. 2, at 10. "This is classically unlawful conduct?"³³ "It is hard to imagine a less defensible practice?"³⁴

Despite its own policies, MCI cloaks its argument in the mantle of consumer choice, claiming that 4,900 Georgia customers declined MCI's service only because they did not wish to have their BellSouth DSL service disconnected. MCI's representations

³² These bundling arrangements are not limited to wireline companies. For instance, Cablevision Systems Corp. offers a service known as Optimum Voice, but does not permit it to be purchased on a stand-alone basis; Optimum Voice is available only to those customers who also subscribe to Cablevision's Internet access service. *See* Ex Parte Letter from Cherie R. Kiser, counsel for Cablevision, to Marlene H. Dortch, FCC, WC Docket Nos. 02-361 *et al.* (Feb. 2, 2004).

³³ MCI at 8.

³⁴ *Id.* at 12.

are misleading. In the Georgia proceeding, MCI claimed to have identified “more than 4900” purchase order numbers (“PONs”) that were rejected from late December 2001 through September 12, 2002, purportedly because the customer had FastAccess. MCI neglects to mention, however, that these more than 4,900 PONs represent a minimal percentage of the total PONs MCI submitted to BellSouth over the same period of time. In fact, less than one percent of the total PONs that MCI submitted to BellSouth were rejected because the customer had FastAccess. Thus, BellSouth’s DSL policy is not having nearly as significant an impact as MCI would have the Commission believe.

Further, BellSouth took a random sample of approximately 10% of the 4,900 PONs and found that 20% of the customer accounts in the sample had terminated voice service with BellSouth. Thus, one in five of these customers had decided to migrate to a voice provider other than BellSouth, including MCI.

Finally, far from supporting the arguments of MCI and other CLECs, antitrust doctrine strongly refutes their claims. The federal court in *Levine* squarely determined that BellSouth’s practice does not constitute an illegal “tying” arrangement. *See Levine*, slip op. at 22. It did so for good reasons. As explained above, when forced to provide stand-alone DSL service, BellSouth loses the efficiencies and economies of scope that it gains from providing it as an overlay service. Stand-alone DSL service is fundamentally a different product than the one BellSouth offers, not the same one that BellSouth is allegedly “tying” to local voice.

In any event, standard principles establish that a tying arrangement may be of concern only where a seller with market power in the tying-product market (here, broadband Internet access) can use the tie to gain power in the tied-product market. *See*,

e.g., *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.) ILECs such as BellSouth have no market power in the broadband (tying-product) market, as this Commission has repeatedly concluded. *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17135-36, ¶ 262, 17151, ¶ 292. And, because the Commission has required BellSouth to make copper loops and sub-loops available so that CLECs can offer both voice and broadband service, BellSouth could not obtain any illegitimate advantage even if it had market power. *See also Florida/Tennessee 271 Order*, 17 FCC Rcd at 25921-22, ¶¶ 177-178 (finding the same tying claim to be “meritless” when raised as a public interest concern).

Nor is there any basis to suggest that BellSouth’s policy is of the kind condemned by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-11 (1985). *See* MCI at 9. The Supreme Court recently explained that the defendant in *Aspen* had “voluntarily engaged in a [prior] course of dealing with its rivals” and refused to provide the precise “product that it already sold at retail” to its rival at full retail price. *Trinko*, 124 S. Ct. at 880. Here, BellSouth had never freely sold stand-alone DSL, and it would be required to go to “considerable expense and effort,” including designing and implementing “[n]ew systems,” in order to do so. *Id.* Indeed, the fact that MCI itself has the same policy precludes any conclusion that BellSouth’s policy is an anticompetitive attempt to leverage allegedly greater market power.

VI. CALEA IS NOT AN OBSTACLE TO COMMISSION ACTION HERE

The United States Department of Justice, the Federal Bureau of Investigation, and the United States Drug Enforcement Administration (collectively, “Federal Law Enforcement”) filed a joint opposition to BellSouth’s Request because of the effect that

such a ruling would allegedly have on the applicability of CALEA to BellSouth's wholesale DSL and retail FastAccess services

Federal Law Enforcement's concerns are apparently based on the uncertainty of the application of CALEA obligations to information services. For all of the reasons stated herein, concerns regarding CALEA applicability should not prevent this Commission from upholding its prior determinations that establish *one* national broadband policy to encourage the development of multiple and competing technological platforms, not multiple and competing state regulatory regimes.

While BellSouth's FastAccess service clearly meets the definition of an information service as previously established by this Commission, it is not necessary for the Commission to make that determination in this proceeding in order to grant declaratory relief. As BellSouth has previously set forth, this Commission can grant BellSouth's Request and preempt the offending state decisions based solely on the ground that these state decisions are preempted by the Commission's *Triennial Review Order* and/or that this issue involves jurisdictionally interstate services subject to the exclusive jurisdiction of this Commission.

In any event, preempting state regulation of broadband services would not affect the applicability of CALEA to the voice service underlying the DSL-based broadband Internet access. Further, BellSouth takes very seriously its role in assisting local, state, and federal law enforcement in their efforts to combat criminals who would use BellSouth's broadband communications services and networks to further their criminal enterprises. BellSouth has previously provided, and will continue to provide, assistance to law enforcement to conduct lawfully authorized surveillance over BellSouth's

broadband networks. BellSouth is unaware of what specific “tools” Federal Law Enforcement believes to be lacking in its attempts to conduct lawfully authorized surveillance over broadband networks (*see* Federal Law Enforcement at 2-3), but looks forward to participating fully in the upcoming rulemaking proceedings to address the technical issues associated with authorized law-enforcement access to IP-enabled services. *See* FCC News Release, *FCC Internet Policy Working Group To Hold First “Solutions Summit”* (Feb. 12, 2004), Letter from Patrick W. Kelley, Deputy General Counsel, Dept. of Justice, to John Rogovin, General Counsel, FCC (Jan. 28, 2004).

BellSouth respectfully represents that issues concerning CALEA’s applicability to broadband services, including the numerous technical aspects of assisting lawfully authorized surveillance over broadband networks, are of paramount importance to the nation’s continued security and should be addressed expeditiously in the proposed rulemaking proceeding.

VII. THERE IS NO BARRIER TO THIS COMMISSION RESOLVING THE URGENT ISSUES PRESENTED HERE

Although most parties do not contest this Commission’s well-established authority to issue declaratory rulings to clarify an issue of federal law, a few parties do argue that this Commission somehow lacks authority to issue a declaratory ruling as to the effects of its prior decisions on state attempts to require ILECs to offer broadband services to CLEC voice customers. None of these claims has merit.

Z-Tel argues that the Commission lacks power to resolve this case because section 252(e)(6) authorizes federal courts to review specific state commission determinations. *See* Z-Tel at 31-33. That argument is directly contrary to paragraph 195 of the *Triennial Review Order*, where the Commission specifically invited parties to

commence proceedings such as this one if state commissions ignore the Commission's national policy determinations

Z-Tel acknowledges this conflict in a footnote, but claims that the state decisions are not "inconsistent with the federal scheme." *Id.* at 33 n.102 That argument, of course, goes to the merits, not to the Commission's statutory and regulatory authority to issue declaratory rulings. *See* 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

Moreover, that argument misunderstands the nature of this proceeding. BellSouth is not asking this Commission to "review" individual state decisions in the manner of a federal court.³⁵ Instead, it is asking the Commission to exercise its authority to declare what the law is, and thus to resolve uncertainty and confusion. The Commission's action is not an adjudication between two opposing parties, but rather a declaration of existing law. *Cf. Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995) (noting, for purposes of appealability, that a declaratory ruling by the FCC was "not an adjudication," but merely an "agency opinion"). The Commission would be empowered to issue such a declaration *sua sponte* without a request from BellSouth. *See* 47 C.F.R. § 1.2 ("The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty"), *see also, e.g.*, Order, *Cingular Interactive, L.P.*, *Showing of Substantial*

³⁵ Z-Tel therefore errs in citing to *Global NAPs, Inc. v. FCC*, 291 F.3d 832 (D.C. Cir. 2002), and Memorandum Opinion and Order, *ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.*, *Emergency Petition for Declaratory Ruling and Other Relief Pursuant to Sections 201(b) and 252(e)(5) of the Communications Act*, 17 FCC Rcd 21114 (2002). *See* Z-Tel at 32 nn.95, 100. In those cases, the private parties were *not* asking the FCC to issue a declaratory ruling establishing the meaning and effect of its rules. Instead, they were literally attempting to create a direct appeal to the FCC, hoping that this agency would overturn specific rates set in a state commission proceeding.

Service Pursuant to Section 90 665(c), 16 FCC Rcd 19200, 19200, ¶ 1 (2001) (“[W]e issue, on our own motion, the following declaratory ruling ”)

Once the Commission clarifies existing law, the federal courts will then have the opportunity to determine the effect of the Commission’s decision on particular cases. Indeed, to harmonize this Commission’s law-declaring function with the federal courts’ adjudicatory duties, BellSouth is asking all the reviewing courts to stay their proceedings temporarily pending the Commission’s resolution of this matter. The Commission would not be replacing the federal courts here, but rather would be assisting those courts by clarifying the law in an area of its expertise. *Cf. Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 417 (5th Cir. 1976) (“When legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One method to accomplish integration is to have the agency pass in the first instance on those issues that are within its competence.”)

Cinergy claims that, because, after BellSouth commenced this proceeding, a Kentucky district court affirmed the Kentucky PSC’s decision, principles of res judicata³⁶ somehow prevent this Commission from declaring what federal law is with regard to the decision of the Kentucky PSC (but not the other state commissions).³⁷ See Cinergy at 7-8, *see also* Supra at 7

³⁶ Cinergy appears to be referring to the doctrine of claim preclusion, which “refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.” *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)

³⁷ In a similar vein, Supra argues that, because the issues here have been decided in the Kentucky case, BellSouth’s only option is to appeal that decision to the Sixth Circuit (or

This argument is wrong for several reasons. Most basically, this case does not involve the same parties as the Kentucky action. Cinergy is seeking to estop *the Commission*, which was not a party to the Kentucky case, from issuing a ruling. And, even if the Commission *had* been a party to the Kentucky case, it is not a party here. The Commission here is the decisionmaker, and therefore cannot be estopped from interpreting its own rules. See *Municipal Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1051 n.3 (6th Cir. 1995) (“As the adjudicator of the MRSC’s rate challenge, FERC was not a party to the case and was not estopped by its participation in the prior *Ohio Power* case from departing from the D.C. Circuit’s decision”), Order, *Compliance with Federal Obligations by the Naples Airport Authority, Naples, Florida*, FAA Docket No. 16-01-15, 2003 FAA LEXIS 93, at *84-*99 (FAA Mar. 10, 2003) (“*FAA Order*”) (holding that the Federal Aviation Administration (“FAA”) could not be bound by a federal district court proceeding to which it had not been a party).

For closely related reasons, the cause of action is not the same here either, which also precludes res judicata. See Cinergy at 8. As BellSouth has emphasized, this proceeding is not a private dispute involving one party with a cause of action against another. Instead, it involves the Commission’s inherent authority to construe its own rules and declare what the law is, apart from any particular set of facts or transactions.

Consistent with these principles, two recent cases establish that preclusion does not apply in circumstances such as those presented here. In *American Airlines, Inc. v. DOT*, 202 F.3d 788 (5th Cir. 2000), there was a dispute over whether Southwest Airlines

the Supreme Court, if necessary). See Supra at 7. In support, Supra cites one case, *Alabama Power Co. v. FCC*, 311 F.3d 1357 (11th Cir. 2002), *cert. denied*, 124 S. Ct. 50 (2003), which stands for the completely unrelated proposition that a three-judge panel of an appellate court cannot overrule a prior panel decision.

would be allowed to offer certain interstate flights from a small airport in the Dallas area (Love Field airport) rather than from the main Dallas-Fort Worth Airport. A local ordinance had required the “phase-out” of service from Love Field and the transfer of services to Dallas-Fort Worth Airport. *See id.* at 793. But Congress had passed a law in 1980 allowing service from Love Field to certain contiguous states, and then another law in 1997 allowing service to a few additional states. *See id.* at 793-94.

Two lawsuits ensued. The city of Fort Worth sued Dallas and other defendants in state court, arguing that additional service from Love Field should be blocked by the local ordinance, the state court found that the ordinance was not preempted by federal law. *See id.* at 795. The city of Dallas filed a declaratory action in federal court against Fort Worth, making the opposite claim. *See id.* While *both* the state appeal and the federal action were pending, several parties sought a declaratory ruling from the U.S. Department of Transportation (“DOT”). That agency ultimately ruled that the local ordinance was preempted by the federal law allowing service to certain states from Love Field. *See id.* Several parties then filed a petition for review, arguing that the DOT order “improperly contravened the earlier state court ruling on the same issues.” *Id.* at 796.

The Fifth Circuit held that the DOT was *not* precluded by res judicata or collateral estoppel from issuing a declaratory order that resolved the issue of federal preemption. It found that “the competing policy considerations weigh against requiring DOT to grant preclusive effect to the state court proceeding.” *Id.* at 800. Among other things, the court stressed that the case involved “an area where federal concerns are preeminent and where DOT is charged with representing those concerns.” *Id.* Thus, “[t]o allow the state court effectively to foreclose the administering agency from further consideration of the

[federal law] would trump the key federal interests that motivated Congress to create DOT and give it authority over these laws ” *Id* at 801 Given the importance of a unified federal policy, the DOT was free to make its decision without being forced to bow to a single court in one limited jurisdiction

Similarly, in *Arapahoe County Public Airport Authority v FAA*, 242 F 3d 1213 (10th Cir 2001), the Tenth Circuit held that, if a Colorado Supreme Court ruling were deemed preclusive, it “would frustrate the FAA’s ability to discharge its statutory duty to interpret and implement federal aviation statutes governing the enforcement of grant assurances ” *Id* at 1221 Moreover, giving preclusive effect to “state court rulings favoring local airport authorities would further lead to inconsistent enforcement of the federally mandated assurances, potentially jeopardizing the efficiency and equality of access to our Nation’s air transportation system ” *Id* The court held that the “Colorado Supreme Court’s decision in *Arapahoe County Public Airport Authority v Centennial Express Airlines* therefore has no bearing on the FAA decision before us.” *Id*

Other federal agencies have accordingly recognized that they have the power to issue declaratory rulings, even if a single federal district court has ruled to the contrary For instance, in one recent proceeding, the FAA ruled as follows:

The NAA [Naples Airport Authority] asserts that the FAA is precluded from addressing the issues raised in the Notice of Investigation as a result of *National Business Aviation Association v City of Naples Airport Authority*, 162 F Supp.2d 1343 (M D Fla. 2001) due to the legal doctrines of res judicata, collateral estoppel, issue preclusion, and comity. In NBAA, an aviation trade group alleged that the NAA’s ban violated the Commerce Clause and the Supremacy Clause of the United States Constitution The court provided summary judgment to the NAA; however, the FAA was not a party to this case The FAA finds that under Federal law, the agency cannot be bound by a judgment that was entered in litigation to which it was not a party

FAA Order, 2003 FAA LEXIS 93, at *1-*3, *see also id.* at *77-*115 (analyzing preclusion issues in greater depth)

These decisions are entirely on point here. This case involves the meaning and effect of the *Triennial Review Order*, as well as this Commission's exclusive authority over interstate communications – all matters that are within the core authority and expertise of this Commission.

More generally, many courts have recognized the general principle that a private lawsuit does not estop a federal agency from applying, interpreting, or enforcing its own rules. For example, most circuits have held that the Secretary of Labor is allowed to file lawsuits challenging ERISA violations without being bound by prior private litigation as to the same defendant. *See, e.g., Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998), *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690-94 (7th Cir. 1986), *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983). These courts have recognized that applying issue preclusion “would impose an onerous and extensive burden upon the United States to monitor private litigation” so that its ability to interpret or apply its own rules would not be compromised. *Donovan*, 716 F.2d at 1462, *see also Herman*, 140 F.3d at 1426 (Congress “never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata”) (internal quotation marks omitted). The same is true here. This Commission should not have to monitor (or potentially intervene in) all the many disputes between various telecommunications companies simply in order to preserve its prerogative to interpret its own rules.

Moreover, to apply preclusion here would contradict the many cases in which federal courts of appeals have ordered that a legal question within the expertise of a federal agency be referred to that agency under the doctrine of “primary jurisdiction.” See, e.g., *In re StarNet, Inc.*, No. 03-2990, 2004 U.S. App. LEXIS 242, at *14-*15 (7th Cir. Jan. 9, 2004) (directly asking the FCC to answer a question about how to interpret its number portability regulation).³⁸ None of these rulings would make sense if the initial district court ruling had issue-preclusive effect on the parties involved and prevented the federal agency from declaring the meaning and effect of its decisions.³⁹

For example, in a case that went to the Eighth Circuit twice (*see Red Lake Band of Chippewa Indians v. Barlow*, 787 F.2d 1235 (8th Cir. 1986); *Red Lake Band of Chippewa Indians v. Barlow*, 834 F.2d 1393 (8th Cir. 1987)), an Indian tribe and the Secretary of the Interior disagreed over a trust fund account that the Indian tribe wished to use to operate a sawmill. After the second appeal, the Secretary petitioned the Eighth Circuit to revise its opinion so as to refer the issue of the sawmill’s viability to his own agency. The Eighth Circuit did just that, *see Red Lake Band of Chippewa Indians v.*

³⁸ See also *Massachusetts v. Blackstone Valley Elec. Co.*, 67 F.3d 981, 993 (1st Cir. 1995) (referring case to EPA so that it could define “cyanides” under its regulations), *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm’n*, 913 F.2d 305, 309-10 (6th Cir. 1990) (ordering district court to stay case pending an FCC determination of whether the Tennessee PSC had contradicted an FCC order); *Detroit, T. & I. R. Co. v. Consolidated Rail Corp.*, 727 F.2d 1391, 1399 (6th Cir. 1984) (ordering district court to refer a tariff issue to the Interstate Commerce Commission), *Distrigas of Massachusetts Corp. v. Boston Gas Co.*, 693 F.2d 1113, 1117 (1st Cir. 1982) (Breyer, J.) (“We intend to invoke the doctrine of ‘primary jurisdiction’ to obtain the view of FERC before proceeding to interpret the tariffs. We do so despite the fact that neither party has directly pressed the primary jurisdiction issue before this court”); *MCI Communications Corp. v. AT&T*, 496 F.2d 214, 220-21 (3d Cir. 1974) (ordering referral of dispute concerning the existence and scope of interconnectivity obligations under uncertain FCC rulings).

³⁹ Supra’s argument that an FCC decision would necessarily violate “well-established ‘separation of power’ principles,” Supra at 7, similarly contradicts the primary jurisdiction doctrine.

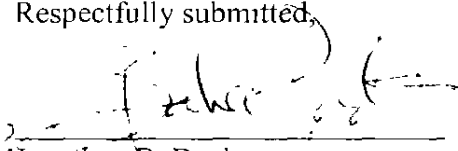
Barlow, 846 F.2d 474, 475 (8th Cir. 1988), ordering the district court to “require the Secretary to conduct the evidentiary hearing to determine the viability of a forest products business on the Red Lake Reservation,” *id.* at 477. In that instance, the agency was allowed to give its opinion even though there were *two* prior district court orders that could have had preclusive effect on the case.

Even if BellSouth were wrong on all these other points, preclusion does not apply to pure questions of law such as the ones presented here. The Supreme Court has long recognized an exception to preclusion for “unmixed questions of law” in “successive actions involving unrelated subject matter.” *See Montana v. United States*, 440 U.S. 147, 162-63 (1979), *United States v. Moser*, 266 U.S. 236, 242 (1924). The current declaratory proceeding is, by design, intended to address a pure question of law. It would be particularly inappropriate to allow preclusion doctrines to prevent the Commission from doing its job: providing a clear rule to the industry and to state commissions charged with implementing federal policy here. *Cf. National R.R. Passenger Corp. v. Pennsylvania Pub. Utils. Comm’n*, 288 F.3d 519, 530 (3d Cir. 2002) (noting that, “when the party to be precluded is a public agency responsible for administration of a governmental program, preclusion may impair its ability to regulate in a coherent manner”), *cert. denied*, 123 S. Ct. 2220 (2003).

CONCLUSION

For the foregoing reasons, and those stated in BellSouth's Request, the Commission should issue a declaratory ruling granting the relief that BellSouth has requested

Respectfully submitted,



Jonathan B Banks
L. Barbee Ponder IV
Suite 900
1133 21st Street, N W.
Washington, D.C. 20036-3351
(202) 463-4182

Lisa Foshce
BellSouth Telecommunications, Inc
675 W. Peachtree Street, N W
Suite 4300
Atlanta, GA 30375
(404) 335-0754

February 20, 2004